IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.376 OF 1994.

Ashok Ramratan Temgire

Ramratan Sitaram Temgire ..Appellants
(Original accused nos.2 and 3)
both residing at
Village Paratwadi,
Taluka :Khed,
Dist: Pune.

vs.

The State of Maharashtra .. Respondent.
(Original Complainant)

Shri S.R.Chitnis, Advocate for the Appellant.

Smt.V.R.Bhosale, APP for the State.

CORAM : S.S.PARKAR, &
S.R.SATHE, JJ.

DATED : 1st Dec., **2004.**

ORAL JUDGMENT (Per S.R.Sathe, J) :

1. Appellants, the original accused Nos.2 and 3 in Sessions case No.356 of 1991 have preferred this appeal against the judgment and order passed by the Court of Additional Sessions Judge, Pune whereby the said two accused are convicted for the offences punishable under section 302 r/w.34 of I.P.C. and each one of them is sentenced to

suffer imprisonment for life and pay fine of Rs.500/- and for offence punishable under section 323 r/w.34 I.P.C. R.I. for one year and to pay fine of Rs.500/-.

2. Brief facts giving rise to this appeal are as under :

. The Original accused nos.3 and 4 are the husband and wife and accused nos.1, 2, 5 and 6 are their children. All these accused persons were residing at village Shinde, Tal: Khed, Dist :Pune. Deceased Shankar Shripati Kolekar was the elder brother of prosecution witness no.9 Uttam. Their sister Sakhubai is given in marriage to original accused no.3 Ramratan, while the daughter of deceased Shankar namely Anandibai was given in marriage to original accused no.2 Ashok (present appellant no.1). After the marriage of Anandibai with accused Ashok, within 6 months she died. Information about her death was not given to the complainant and deceased Shankar promptly. Subsequently, they came to know that Anandibai was murdered by her husband Ashok (present appellant no.1). Shankar had therefore filed a complaint

against Ashok alleging that he committed murder of Anandibai. Not only that but on the basis of the said complaint Sessions Case was filed against Ashok but he was acquitted in the same. Since then the accused Ashok, Ramratan and their family members were having a grudge against deceased Shankar.

3. On 5.2.1991 complainant Uttam (P.W.9) and his brother deceased Shankar were going to village Talegaon with a pair of bullocks for fitting horse shoe on the legs of the bullocks. When they were passing through Paratwadi at about 8.a.m. the original accused no.1 Kashinath and accused Ashok and Ramratan accosted the complainant and Shankar. They abused them and asked them as to why they spread rumours about the death of Anandibai. They also threatened that they will take revenge. The complainant and deceased Shankar however went from the said place to Talegaon and completed the work regarding fitting of horseshoe on the bullock’s legs. As a result of the earlier incident, Uttam and Shankar were apprehending some danger and as such while returning they changed their way. When

they reached near Karanji Vihire at about 1.30 p.m. they saw accused Ramratan coming from opposite side on bicycle. He reached near the complainant and Shankar and threw the bicycle and gave a call to his sons Ashok and Kashinath who were concealing themselves by the side of culvert. On hearing the call of Ramratan, accused Ashok and Kashinath went near Uttam and Shankar. Accused Ashok was holding a stick in his hand. Besides, he was also having stones with him. At that very time Sakhubai, accused no.3 and her daughters Mangal and Kalpana i.e. accused nos.5 and 6 rushed to the said place and all of them started pelting stones towards the complainant and deceased Shankar. Accused Ashok went near Shankar and gave him stick blow, as a result of which Shankar fell on the ground. Accused Ashok was hitting him with stones. Remaining accused also pelted stones towards complainant. As a result of said beating, Shankar as well as Uttam sustained bleeding injuries and then accused ran away. At that very time Ramdas Kakade, P.W.8. was proceeding on motorcycle by the side of that place. Complainant Uttam therefore stopped him

and requested him to give lift. The said witness therefore took Shankar and Uttam on his motorcycle and then he left them at Talashi Patha. When they were at the said place Popat Rambhau Kolekar, P.W.3 reached at that place. Complainant Uttam requested him to make some arrangement for taking them to hospital. On that he brought one bullock cart and took Uttam and Shankar in the said bullock cart near Hanuman temple. Unfortunately, Shankar died at the said place. In the meantime somebody had informed Complainant's brother Govind about the incident. Govind, therefore went to Hanuman temple. From there he took complainant and Shankar to Chakan hospital. The complainant told the doctor about the incident. Thereupon the doctor asked them to contact police. Uttam therefore went to Chakan Police Station. Finding that the incident had taken place within the territorial jurisdiction of Talegaon Dabhade, the constable on duty at Chakan Police Station asked them to go to Talegaon Dabhade Police Station and also told that he will give message on telephone. Govind Kolekar, therefore, took Uttam to Sasoon Hospital, Pune. When police received information

about the entire incident and came to know that injured Uttam is admitted in the hospital, PSI Suryavanshi went to the hospital and recorded the complaint of Uttam Sripati Kolekar. On the basis of the said complaint police registered the offence punishable under section 147, 148, 149, 307, 302, 337, 342 of I.P.C. against six accused persons named earlier.

4. Police drew inquest panchanama exhibit 12 and sent the dead body for post mortem to Talegaon Dabhade. The doctor on duty did the post mortem and submitted the advance certificate wherein he opined that the probable cause of death was Cardiogenic and Neurogenic shock due to rupture of Liver, Ruptured Spleen, Rupture of Splenic Artery, about three litres of fresh blood found in peritoneum cavity with fractured rib. Police then arrested the accused on 6.2.1991. They also attached the clothes of the accused which were on their person as the same were blood stained. Police also sent accused Ashok and Ramratan to medical officer as they had sustained some minor injuries. Police recorded the statement of

witnesses and after completion of the investigation police submitted chargesheet against the accused persons for the offences mentioned above. Finding that the accused are chargesheeted for the offences punishable under section 302 and 307 IPC which are exclusively triable by the Court of Sessions, the learned JMFC committed the case to Sesions Court, Pune.

5. The Additional Sessions Judge, Pune, framed charge exhibit 2 against these accused for the offences mentioned above. The charge was read over and explained to the accused. All the accused pleaded not guilty and claimed to be tried.

6. In order to bring home the guilt of the accused prosecution examined as many as 13 witnesses consisting of P.W.1 Dr. Suresh Kulkarni, exhibit 16, P.W.2. Kashinath Boche, exhibit 24, P.W.3. Popat Kolekar, exhibit 27, P.W.4. Bajirao Kolekar, exhibit 28, P.W.5 panch, Dyanu Ronahdi, exhibit 29, P.W.6. Eknath Padwal, exhibit 31, P.W.7Baban Dahatonde exhibit 32,

P.W.8. Ramdas Kakade exhibit 33,Injured eye witness P.W.9. Uttam Sripati Kolekar, exhibit 34, P.W.10 Police Inspector Mohanrao Mane exhibit 36, P.W.11 Govind Kolekar exhibit 38, Dr. Ingale, who examined Uttam exhibit 39, and Investigating Officer PSI Ashok Suryavanshi exhibit 43. Prosecution also produced inquest panchanama exhibit 12, panchanama of place offence exhibit 13, post mortem notes exhibit 17, panchanama of clothes of the accused exhibit 25, panchamama regarding production of stick exhibit 30, complaint exhibit 35, C.A. report exhibit 46 etc. Accused did not examine any witness. From the suggestions put to the prosecution witneses and from the statement of the accused recorded under section 313 of Cr.P.C. it appears that the defence of the accused was that at the relevant time accused Ashok and Ramratan were proceeding on bicycle. Complainant Uttam and Shankar met them on way and they started beating Ashok and in that process Shankar might have fallen on the road on which several stones were lying. It is also their defence that when Uttam and Shankar were beating them, they tried to protect themselves. Thus, the

accused have contended right of private defence.

7. After considering the evidence adduced by the prosecution and the arguments advanced by both the learned Advocates, trial court came to the conclusion that prosecution failed to prove unlawful assembly and there was no satisfactory evidence against the original accused no.1, 4, 5 and 6 to hold them guilty of the offences with which they were charged. According to trial Court the evidence adduced by the prosecution against accused nos.2 and 3 was sufficient to hold them guilty of the offences punishable under section 302 r/w. 34 of I.P.C. and section 323 r.w. 34 of I.P.C. Trial Court therefore acquitted accused nos.1, 4, 5, and 6 of all the charges levelled against them and convicted accused no.2 Ashok and accused no.3 Ramratan for the offences punishable under section 302 and 323 r/w34 of I.P.C. and passed the order of conviction and sentence as mentioned above.

8. It is this order that is being challenged in the present appeal. In this appeal before us

Shri Chitnis, learned Advocate for the original accused nos.2 and 3 has urged three points. Firstly, he submitted that original FIR is not produced by the prosecution. According to him the information regarding the incident was given to Chakan police for the first time and at that very time they had come to now that during the incident death of one person had occured and as such they were aware of the occurrence of a cognizable offence. He, therefore, submitted that the prosecution ought to have produced the information that was reduced to writing by Chakan Police. He also submitted that exhibit 35 can not be regarded as FIR or complaint because according to him it is nothing but a statement of injured witness Uttam recorded during the investigation. He, therefore, submitted that the genesis of the offence is not disclosed by the prosecution and as such the evidence is not sufficient to hold the accused guilty of the offence of murder. Secondly, the learned advocate for the defence argued before us that there was no sufficient evidence to show that accused no.2 Ashok and accused no.3 Ramratan assaulted deceased Shankar on any particular

portion of the body as a result of which he sustained particular injury and it caused the death. He also canvassed before us that the prosecution has failed to adduce sufficient evidence to show that the injuries in question were caused or were likely to be caused by stick and stones which are before the court. Besides this, as the prosecution witness has stated that all the accused pelted stones it cannot be said that the injuries as a result of which death was caused were due to overt act of the present appellants i.e. original accused nos.2 and 3. Lastly, he submitted that there is no sufficient evidence with regard to discovery of stick. He, therefore, submitted that the appeal be allowed and the accused be acquitted. In the alternative, he submitted that taking into consideration the evidence on record, at the most original accused no.2 Ashok can be convicted for the offence punishable under section 323 of I.P.C. As against this, the learned APP submitted that there was sufficient evidence to show that accused Ashok actually assaulted Shankar and as a result of the same he had sustained several injuries which had

resulted into rupture of spleen and liver and as such trial court rightly held that the original accused nos.2 and 3 are guilty of the offences punishable under section 302 and 323 r/w.34 of I.P.C.

9. The interse relation between the accused is not in dispute. Similarly, it is an admitted position that deceased Shankar was elder brother of the complainant injured Uttam. Admittedly, daughter of deceased Shankar, Anandibai, was given in marriage to Ashok i.e. original accused no.2. After her marriage with Ashok, Anandibai died within six months from the marriage. At that time Shankar as well as Uttam were having a doubt that Ashok must have killed Anandibai and hence complaint was lodged and Ashok was prosecuted. However, he was acquitted in the said case. Since then accused Ashok as well as his father Ramratan (present appellants) were having a grudge against the present complainant and his elder brother Shankar. They were asking them as to why they spread the news as a result of which impression was created amongst the public that Ashok

committed murder of his wife Anandibai. It has also come on record from the evidence of P.W.9 Uttam that on the day of the incident, in the morning while they were proceeding to village Induri accused persons met them and at that time they asked Uttam and Shankar about spreading the news and threatened them. Thus, from this evidence it is very clear that there was motive for the crime in question.

10. P.W.8. Ramdas Kakade, exhibit 33 has stated that on the day of the incident, in the afternoon, when he was passing by the road, he saw P.W.9 Uttam Kolekar and his elder brother Shankar lying on the road and at that time Uttam stopped him and requested him to give lift and then he took both of them on the motorcycle and left them at Hanuman temple. It is the case of the prosecution that at that place Shankar, who had sustained injuries succumbed to the said injuries. Admittedly the dead body of Shankar was subsequently sent to Talegaon Dabhade for post mortem. Dr. Subhash Kulkarni, P.W.1 did autopsy and prepared post mortem notes exhibit 17. From

the perusal of the said post mortem notes we find that the doctor noticed following external injuries as mentioned in column no.17.

"**Column 17 :** 1) CLW on External occipital protuberance region of scalp. Three in Number. Each 3"x2"x1" Bone deep heavy bleeding.

2) Abrasion Lt. lower eye lid region 3"x2" colour-Reddish.

3) Fracture Rt.Rib (2)No.

The doctor also opined that the probable cause of death was cardiogenic and Neurogenic shock due to rupture of Liver, Rupture of spleen, rupture splenic artery, about three litres of fresh blood found in Peritoneal Cavity with fractured rib. Dr. Kulkarni has stated that the injuries mentioned in column 17 are possible due to hit by stones. The fracture of rib is also possible due to blow of stick or stone. Not only that, but he has further stated that if a person is hit by stones by many persons continuously then such type of injuries

are possible. So, from his evidence coupled with the evidence of Uttam Kolekar exhibit 34, who has categorically stated that at the relevant time accused Ashok hit his elder brother Shankar with stones and stick and he sustained bleeding injuries and fell on the ground, it is very clear that the death of Shankar was neither accidental nor suicidal, but it was homicidal.

11. The main and material question is whether death of Shankar was caused due to injuries sustained by him as a result of assault made by accused no.2 and/ or 3. While considering this aspect, at the outset it must be mentioned that the prosecution case rests on the sole testimony of the injured eye witness Uttam Kolekar exhibit 34. It must also be mentioned that if we see the suggestions put to the said prosecution witness and the statement of the accused persons recorded under section 313 of Cr.P.C. it is very clear that even according to them on 5.2.1991 at the relevant time some incident took place between these two accused persons and Uttam and Shankar. The suggestion is put to Uttam Kolekar that at the

relevant time Ashok and Ramratan were in fact going on a bicycle and Uttam and Shankar met them and they started beating the accused Ashok and Shankar. So, the presence of Ashok and Ramratan at the place of offence is in fact admitted. Not only that but the suggestion is also put to the said witness that during the said scuffle Shankar might have fallen on the road where there were several stones. So, from this also it is very clear that the presence of accused and some incident had taken place is admitted by the accused. The question is, whether the incident took place as narrated by prosecution witness Uttam or whether, it took place as suggested by the defence.

12. At the outset it must be mentioned that though the stand taken by the accused is of right of private defence, they have not adduced any evidence in support of the said stand. It is true that accused Ashok as well as Ramratan had sustained some injuries and the said injuries have not been explained by the prosecution. However, merely because of that we can not jump to the

conclusion that the case of the prosecution is not worthy of credence. If we peruse the medical certificate of accused Ashok and Ramratan then it is quite evident that the injuries sustained by them were very minor. Moreover, they had also not sustained bleeding injuries. There was absolutely no reason for the prosecution witness Uttam or deceased Shankar to note the said injuries. Naturally there was no question of giving any explanation about the said injuries. Besides this the injury sustained by Ramratan to his finger was contusion and swelling which was quite possible to have been caused while pelting stones or while holding stick to assault Shankar. Ashok had only one abrasion of 1/4" X 1/4" on parital region. So non explanation of the minor injuries sustained by the accused is not at all fatal to the prosecution in the instant case. Besides this, it must also be noted that if really the prosecution witness Uttam and Shankar would have attacked Ashok and Ramratan first and assaulted, them then certainly, Ashok and Ramratan would have filed a complaint against them. A feeble attempt has been made by them to show that they had tried to file a

complaint but police did not record the same. However, for this, they have not adduced any evidence. Besides this, if their complaint would not have been recorded at the police station, they could have sent their complaint to superior officer by post, but that has also not happened. So, this is another circumstance which also negatives the case of the defence. As against this, we find that prosecution witness Uttam has filed a complaint when he was in hospital. The said complaint is at exhibit 35. Question arises whether the same can be treated as FIR. It is true that Chakan Police had received some information about the incident in question and as a result of the same they had further transmitted the said information to Talegaon Dabhade police station, as they had come to know that the alleged incident had taken place within the territorial jurisdiction of Talegaon Dabhade. It does appear that at that time they had come to know that during the incident one death has occurred and the other injured was admitted in the hospital. However, the fact remains that though they had received the information, it was not reduced to

writing by the police. When such is the position, it must be held that there was no FIR as contemplated by law. On the contrary, it appears that as the injured was admitted in Sasoon Hospital, police informed Haveli Police Station about the same and then P.I.Suryavanshi went to the Sasoon Hospital and recorded the complaint of Uttam, wherein he had given all the information about the incident, including the names of the accused persons. The said complaint was forwarded to Talegaon, Dabhade Police Station as the incident had taken place within their jurisdiction and then on that basis crime was registered. So, taking into consideration this factual position, it must be said that exhibit 35 is the FIR in the instant case. It is true that even Chakan Police could have recorded the information received by them, but when we find that there is no specific evidence as to who gave the information and whether it was sufficient for the police to reduce it into writing so as to treat it as FIR we can not hold that exhibit 35 is not the real FIR. In any case, if Chakan police have failed to reduce into writing the information received by them,

then merely for the fault of the police in that behalf the entire prosecution case can not be made to suffer.

13. Witness Uttam Kolekar exhibit 34 has specifically stated that at the relevant time accused Ramratan came from the opposite side on bicycle, he threw the bicycle and then called Kashinath and Ashok. Immediately thereupon they came there. At that time Ashok was having stick and stones in his hand. He has also stated that accused Ashok gave a blow with stick to Shankar and he fell on the ground. He has also stated that Ashok hit Shankar wit stones. The evidence of Uttam in this behalf is corroborated by the medical evidence. It has come in the post mortem notes exhibit 17 that deceased Shankar had sustained various injuries and his spleen and liver were found ruptured. We also find that at the relevant time injuries were also noticed on the head of Shankar. Shri Chitnis, learned Advocate for the defendants strongly argued before us that in the instant case, it was the prosecution case that at the relevant time all

these accused persons pelted stones towards the deceased and witness Uttam and as a result of the same they sustained injuries. Except the present appellants all the other accused persons have been acquitted by the trial court of all the offences including for the offences punishable under section 147, 148 and 149 I.P.C. He, therefore, submitted that even if it is assumed that at the relevant time Shankar had sustained such injuries and the liver and spleen were ruptured, still then there is no specific evidence to show as to as a result of whose over act those specific injuries were caused. While considering this argument, it is to be noted that witness Uttam had only vaguely stated that all accused persons pelted stones. Infact, if we peruse the marathi deposition, it appears that therein it is mentioned "

" It means they were throwing stones towards Shankar. There is lot of difference between the marathi words **'Takane ' 'Phekane' and 'Marane' (throwing, pelting and hitting).** So far as Ashok is concerned, witness Uttam has categorically stated that Ashok was hitting deceased Shankar

with stones. Thus, we find that so far as Ashok is concerned Uttam was specific about the overt act committed by Ashok. It must also be noted that Uttam has stated that at the relevant time first Ashok had given a blow with stick to Shankar and as a result of the same he had fallen. So merely because the prosecution witness Uttam had stated that all the accused persons were pelting stones we can not jump to the conclusion that there was no sufficient evidence against Uttam. Much is made about the fact that no external injuries were found on abdomen though liver as well as spleen were ruptured. It was tried to be suggested by the defence advocate that it is not possible to have both these injuries at one and the same time. But it must be noted that it is not the case of the prosecution that Ashok hit only one stone to Shankar. On the contrary it appears that Shankar was hit by stones by Ashok and in that process Shankar received above-mentioned injuries. Initially it was tried to be suggested that when the liver and spleen were ruptured there ought to have been some external injuries on the abdomen. For that

purpose reliance was placed on the observation made in Modi’s Medical Jurisprudence page 287 to 291(Edition). However, at page 287 and 288 it is mentioned "Owing to its size, its fixed position and its friable consistence, the liver is frequently wounded by a stab in the abdomen, or is often ruptured by a blow, kick, crush in a vehicular accident, or fall, or even by a sudden contraction of the abdominal muscles, a case of rupture of the liver following an epileptic fit has been reported. It may also be lacerated by the fractured ends of a rib perforating the diaphragm. There may not be signs of external injury. Fifteen cases of rupture of the liver came to Modi’s notice during a period extending over eight years. out of these external marks of injury were visible in three only" . So, from these observations it is very clear that rupture is possible even without there being any external marks of injury. Main question according to us is whether the stones in the instant case were sufficient to cause the injuries in question. For that purpose, we have seen the articles and in particular stones attached in the instant case.

It appears that some stones are not at all pointed and of quite big size i.e. of the size of palm and comparatively having smooth finish. If the person is hit with such stones repeatedly then obviously the injuries in question are possible. In fact Doctor has also stated in his deposition that the injuries noticed on the person of the deceased were possible due to stone or stick. It is true that from his evidence it appears that stones before the Court were not shown to him. However, merely because the said stones were not shown we can not ignore his evidence. It is also tried to be suggested that it was necessary for the prosecution witness Uttam to state as to on which portion of the body Ashok had given blows or hit him with stones. It must be noted that admittedly, at the relevant time Ashok had also sustained injuries. Though the said injuries were minor or simple the same were caused on vital part and there were some bleeding injuries also. So, when he himself had sustained some injuries and was also being attacked it was not at all possible for him to observe the incident so minutely so as to tell on which exact portion of the body

Shankar, the accused Ashok hit the stones. Certainly such type of evidence is not at all required particularly when entire incident has taken place all of a sudden and that too within short time. So, merely because witness Uttam has not deposed about the exact portion of the body on which assault was made we are not at all inclined to hold that the evidence of Uttam is not sufficient to prove the over act of Ashok.

14. Shri Chitnis also argued before us that if really the incident as stated by Uttam would have occurred, then normally, he would have disclosed the names of the accused persons and the role played by each of them to some other person and in particular to prosecution witnesses Popat R, Kolekar exhibit 23 and Ramdas Kakade exhibit 34 who had taken deceased and injured from the place of offence upto a particular place. So far as P.W.3. Popat Kolekar (exhibit 27) is concerned, it is true that he has not specifically stated that at the relevant time Uttam told the names of the accused. But at the same time he has clearly stated that when he asked Uttam about the incident

Uttam narrated the incident. This answer suggests that whatever had happened was disclosed by him to the said witness which obviously includes the names of assailants. It must be noted that this was not a case where the deceased Shankar and Uttam were assaulted by some unknown persons. On the contrary, as mentioned earlier the presence of accused persons at the place of offence and some incident between the accused persons and the deceased is admitted. S,o merely because witness Popat Kolekar has not categorically stated that at the relevant time P.W.Uttam told the names of the accused it would not change the fate of this case. Nor it would be sufficient to hold that the testimony of Uttam is not reliable. Same is the case in respect of P.W.8. Ramdas Kakade, exhibit 34. He has stated that at the relevant time Uttam told him that his brother in law from Shinde Vasoli and his family members beat him. Not only that but even in a complaint which is lodged soon after the incident the names of accused are mentioned. Prompt lodging of complaint supports prosecution version. So, considering all this evidence we do not find that subsequent conduct of

Uttam creates any doubt about the prosecution version.

15. There is another piece of evidence which also lends some support to the prosecution version. It is an admitted fact that the accused persons were arrested on 6.2.1991 and thereafter the clothes which were on the person of accused were attached under panchanama exhibit 25. Prosecution has examined panch witness Kashinath Boche exhibit 24 who has stated that in his presence the clothes of the accused were attached. It has also come on record that the said clothes were subsequently sent to C.A. The C.A. report is produced at exhibit 46. From the perusal of the same it appears that the blood group of accused Ashok is B. So also of Kashinath and other accused persons. Accused Ramratan's blood group is 'O'. Blood group of deceased Shankar was 'B'. It was also tried to be argued that as the blood group of accused and deceased was same evidence with regard to finding of blood stains on clothes of accused has no relevance. However, while considering this aspect, it must be noted

that there is nothing on record to show that at the relevant time the accused Ashok had sustained any bleeding injury as a result of which there was possibility of having blood on his clothes. So, the finding of blood of group B, which was of the deceased, on the clothes of Ashok also connects him with the alleged crime.

16. P.W.5, Dyanu Ronahd, exhibit 29 has stated that when accused was in the police custody he made a statement before the police in presence of panchas that he would produce the stick and accordingly said stick was produced by him and it was attached under panchanama. The evidence of this witness is not at all shaken or shattered in the cross examination. On the contrary it is also corroborated by the Investigating Officer. It is tried to be argued on behalf of the defence that the evidence of Dyanu Ronahd with regard to production of stick is not in accordance with law and it can not be said that there was real discovery as contemplated under section 27 of the Indian Evidence Act. It is true that there are some minor defects in this and as s result of the

same we do no attach any importance to the production of the stick by accused Ashok.

17. Having regard to totality of evidence it appears that the prosecution has proved beyond reasonable doubt that on the day of incident accused Ashok had hit Shankar with stick and stones and as a result of the same Shankar sustained injuries mentioned in column no.17 of the postmortem notes exhibit 17. As a result of the said injuries he died within short time. It must also be noted that there is evidence to show that on that very day in the morning Ashok and other accused had given threat to Shankar and Uttam and thus there was motive to commit the crime.hence we are of the view that the trial court has rightly held that so far as accused Ashok is concerned, he has committed an offence punishable under section 302 of I.P.C.

18. So far as the original accused no.3 Ramratan is concerned, we find that even Uttam has not attributed any specific over act against Ramratan. All that he has said is that at the

relevant time accused Ramratan came from the opposite side on bicycle and at that time he called other accused and on his call they came and the incident took place. Merely because initially Ramratan had called them, we can not jump to the conclusion that Ramratan had also intention to commit murder of Shankar or Uttam. Had it been so, then we would have found Ramratan taking active part in the further assault. As mentioned above only one vague statement is made by Uttam that at the relevant time all accused pelted stones. That by itself is not sufficient to rope accused Ramratan for the offence punishable under section 302 of I.P.C. At the most it can be said that as at the relevant time Ashok and Shankar were assaulted with stones, Ramratan can be held guilty of the offence punishable under section 323 of I.P.C. We, therefore, feel that there is no substance in the appeal filed by Ashok and therefore, confirm the order passed by the trial court against him and only modify the order passed by the trial court against accused Ramratan.

. In this view of the matter, the appeal is

partly allowed. The order of conviction and sentence passed by the Additional Sessions Judge, Pune in Sessions Case No.356 of 1991 against Ashok Ramratan Temgire is slightly modified and he is convicted for the offence punishable under section 302 of I.P.C.instead of section 302 r.w34 of I.P.C. and is sentenced to suffer rigorous imprisonment for life and to pay fine Rs.500/- (Rupees Five Hundred Only) i.d. R.I. for nine months. He is also convicted for the offence punishable under section 323 r/w 34 of I.P.C. and is sentenced to undergo imprisonment already undergone and to pay fine of Rs.1000/- i/d. R.I. for one month.

. The order of conviction and sentence passed by Additional Sessions Judge, Pune in Sessions Case No.356 of 1991 against accused Ramratan Sitaram Temgire for the offence punishable under section 302 of I.P.C. is set aside and he is acquitted of the offence punishable under section 302 r/w. 34 of I.P.C. The order of conviction recorded under section 323 r/w.34 of i.P.C. against him is maintained

however the order of sentence is modified and he is sentenced to undergo imprisonment already undergone and to pay fine of Rs.1000/- (Rupees One Thousand Only), which is maximum under section 323 of I.P.C. i/d. to suffer R.I. for one month.

. The accused no.1 is entitled to get set off under section 428 of Cr.P.C. for the period of detention undergone by him in connection of this offence.

. The accused to surrender their bail bonds forthwith.

. So far as accused Ramratan Sitaram Temgire is concerned, his bail bond shall stand cancelled after he deposits the fine amount. Fine is to be paid within two weeks, in the lower court.

(S.S.Parkar, J)

(S.R.Sathe, J)